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Issue Date: 03 November 2004

Case No.: 2002-LHC-2696

OWCP No.: 07-112461

In the Matter of:

LEROY SMITH,
Claimant

v.

NICOR NATIONAL,
Employer,

and

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,
Carrier.

APPEARANCES:

FRANCIS B. MULHALL, ESQ.,
On Behalf of the Claimant

JEFFREY C. BRENNAN, ESQ.
FOSTER NASH, ESQ.
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act" or "LHWCA"). The claim is brought by Leroy Smith, "Claimant" against Nicor National,

"Employer," and National Union Fire Insurance Company of Pittsburgh, "Carrier." Claimant sustained a back injury during his employment with Nicor National on November 4, 1988. Claimant asserts that he is entitled to permanent total disability benefits and past due and future medical expenses. A hearing was held on May 3, 2004 in Metairie, Louisiana, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence[1]:

1) Claimant's Exhibits A through U; and

2) Employer's Exhibits A through PP; and

3) Joint Exhibit No. 1

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[2]

STIPULATIONS[3]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. Claimant was a sandblaster/painter at Nicor National and was injured while turning a crank on the wing wall of a dry dock at the employer's yard at the time of injury.

2) The date of Claimant's injury/accident was November 4, 1988.

3) Claimant's injury was in the course and scope of employment.

4) An employer/employee relationship existed at the time of the accident.

5) Employer was advised of the injury on November 4, 1988.

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[1] Claimant's Exhibits Q, R, S, T and U and Employer's Exhibits KK, LL and MM are hereby admitted into evidence. The opinion of Dr. Carthane was given little weight and was not relied upon in the Reasons for Judgment.

[2] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.

[3] JX-1.

6) The Notice of Controversion was filed on November 10, 2001 and December 21, 2001.
7) An Informal Conference was held on September 17, 2003.

8) Temporary total disability was paid from November 4, 1988 through March 23, 1998 for 489.571 weeks at $203.30 per week for a total of $99,573.85.

9) LWEC was paid from March 23, 1998 through the present at $66.03 per week.

10) The date of maximum medical improvement was June 28, 1996.

ISSUES

The unresolved issues in these proceedings are:

(1) Nature and Extent of Disability;

(2) Average Weekly Wage;

(3) Reasonable and Necessary Medical Expenses;

(4) Entitlement to Attorney's Fees

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Leroy Smith

Leroy Smith, Claimant, testified that he is fifty-six years old and sustained a back injury on November 4, 1988 while employed by Nicor National as a sandblaster and painter. At the time of the injury, he had been employed by Nicor National for approximately five years. His pay was $9.00 per hour, and he averaged approximately forty hours per week. Prior to working for Nicor National, he worked at Gretna Machine Iron Works as a sandblaster and painter for nine years until he was laid off, whereupon he gathered unemployment for two years. TR 27-28, 31, 52; RX-PP, pp. 13-15.

On November 4, 1988, Mr. Smith injured his back while turning a crank on a dry dock to lift a tug boat onto blocks for sandblasting. Each block was attached to a crank by chain; when the crank was turned, the block would gradually slide under the base of the boat. One of the cranks stuck while Mr. Smith was trying to turn the handle, and as he bent over to turn the handle, he felt an onset of pain in his back. He immediately

reported his injury to foreman Joe Nicor. Mr. Smith was sent to company doctors, Logan and Nelson. TR 29-31; CX-C, p. 4.

Mr. Smith initially received compensation checks at a value of $406.00 every two weeks. The checks were reduced to $132.06 every two weeks in March of 1998. Mr. Smith testified that the checks were often late, which affected his ability to pay rent. He has kept the check stubs pursuant to the instructions of his attorney. Each stub or envelope is dated with the date that he received them. His attorney instructed him to do so. Mr. Smith testified that he was diligent about checking his post office box for the checks. Because he could not pay his rent timely, Mr. Smith was forced to move several times, living often with family members. At the time of his injury, Mr. Smith lived at 571 Magnolia Street where he paid a rent of $375.00 per month. When he was unable to keep up with his rent, he moved in with his brother at 6637 Benedict Street in Marrero. After one year, he moved in with his sister at 6629 Benedict Street. One year later, he moved to 875 Victory Drive to live with his mother, and they shared the rent. His mother died in 1998. In 1999, he moved to 7425 Clermont Street. After one year, he moved to his brother's house at 502 Jung Boulevard, which is his current address. There was also a period of a few weeks where Mr. Smith lived on the streets. Mr. Smith testified that he feels depressed as a result of having to move so often and his inability to pay rent. TR 32-38, 49-50, 125-126; RX-C.

Mr. Smith has seen many doctors regarding his injury. He testified that Drs. Logan and Nelson sent him to see Dr. Carlos Gorbitz. Dr. Gorbitz sent him to see Dr. Cashio. Mr. Smith also recalled seeing Dr. King for one visit, but did not recall who referred him. Mr. Smith testified that he has seen Dr. Connolly many times and that Dr. Connolly performed surgery on his back in 1995. He said that even after the surgery, he continued to have pain in his lower back extending down both legs. He maintained that he has lost feeling in both of his legs and related that his legs sometimes did not respond when Dr. Connolly would test his reflexes. Mr. Smith testified that there were times he wanted to see Dr. Connolly, but could not because the insurance company had not authorized the visit. Mr. Smith recalled seeing Drs. Rosenfeld, Maresh and Shwery, to whom his attorney, Mr. Mulhall, referred him. TR 41-44, 54, 128-132.

Mr. Smith encountered problems when attempting to fill his prescriptions. Mr. Smith testified that he was unable to obtain the medications prescribed by Drs. Logan and Nelson because the insurance company had not authorized them. The prescriptions were ultimately never filled. Mr. Smith encountered similar problems filling medications prescribed by Drs. Gorbitz, Maresh and Rosenfeld. TR 45-47.

Prior to the injury at issue, Mr. Smith was injured at Nicor National on two other occasions. In 1985, he hurt his back while picking up a five-gallon paint can and was absent from work for three weeks. In 1986 or 1987, he fell into a hole on a barge and injured his knee; he was absent from work for about six weeks. TR 40-41, 51; RX-PP, p. 17-21.

Mr. Smith does not feel that he can return to work due to his constant pain. He believes that his pain has progressively worsened and that the medicines and treatments have only helped somewhat. Mr. Smith has not attempted to find any job since 1988 nor enrolled in any literacy program. Mr. Smith has never been provided with a list of the jobs the vocational rehabilitation counselors found for him. TR 48-49, 124-127.

Regarding his mobility and transportation arrangements, Mr. Smith testified that he has never had a driver's license and that he walks, catches a ride or takes the bus when he needs to get somewhere. If he is having a good day, he is presently able to walk to the grocery store and to cash his checks. TR 52-53.

Mr. Smith was awarded Social Security disability in 1995, but was cut off in 2001. He received Social Security benefits in the mid-1990s. He received an initial lump sum of $15,000.00 and then monthly benefits, starting at $321.00 per month and increasing to $450.00 per month. He testified that when he stopped receiving SSI checks, he did not receive any ruling or explanation as to why. RX-PP, p. 24; TR 53-57.

II. MEDICAL EVIDENCE: Depositions and Medical Records

Dr. Alberto Arrillaga, a company doctor, initially diagnosed Mr. Smith with a lumbar sacral strain on November 4, 1988. He was subsequently followed by company doctors Logan and Nelson who did not allow him to return to work. Dr. Logan referred Mr. Smith to an orthopedist, Dr. L. Thomas Cashio at Jefferson Orthopedic Clinic. Dr. Cashio diagnosed Mr. Smith with mechanical back pain secondary to degenerative disc disease. Dr. Cashio gave Mr. Smith a lumbar corset and referred him to physical therapy. He performed a bone scan and CAT scan; the CAT scan revealed degenerative changes but no evidence of herniated discs. RX-G; RX-H.

Dr. Arrillaga referred Mr. Smith to Dr. Gorbitz, a neurosurgeon. Dr. Gorbitz first examined Mr. Smith on January 23, 1989. The physical exam showed spasms of the lumbar muscles, limited and painful lumbrosacral movements, and lumbar and gluteal pain on the left side. He reviewed the CAT scan performed by Dr. Cashio and found degenerative changes at L4-L5, evidence of lumbar spinal stenosis and hypertrophy of facet joints with foraminal compression. He recommended a back rehabilitation program and the use of steroids and anti-inflammatory medications. Mr. Smith showed no improvement after back rehabilitation, and an MRI performed on February 16, 1989

showed marked degenerative changes at the L5-S1 disc with foraminal compression. Dr. Cashio also analyzed the MRI done by Dr. Gorbitz in February of 1989 and found degenerative changes and some bulging discs but no evidence of nerve root impingement. At this point, Dr. Gorbitz recommended an epidural steroid injection, which proved ineffective. On March 31, 1989, Dr. Gorbitz analyzed another myelogram and CAT scan, finding "lumbar stenosis and moderate to significant degenerative changes in the lower and midlumbar spine which produce this stenosis, . . . compromise in the diameter of the spinal canal and . . . compression [of] the nerve roots." He advised that the patient undergo a decompressive lumbar laminectomy of the L4 and L5 segments. He sent his recommendation in written form to the Carrier's adjuster, American International Adjustment Company (hereinafter, "American International"). RX-K; RX-H, p.28.

American International sent Mr. Smith to Dr. Carl F. Culicchia, a neurosurgeon, who examined Mr. Smith on May 9, 1989. Dr. Culicchia reviewed the CAT scan, finding degenerative disc changes in the lower three disc spaces, particularly at L5-S1 and L3-L4, and narrowing of the spinal canal in the lower segments. He found no evidence of nerve root compression. Dr. Culicchia reviewed the MRI scan, where he found evidence of spondylosis at L5-S1 and L3-L4. Dr. Culicchia opined that the lumbar spondylosis was a structural abnormality that was present before Mr. Smith's injury. He could not establish an objective relationship between the structural abnormality and the patient's symptoms; therefore, he recommended that surgery be deferred until this relationship was established. He felt the relationship lacked because the physical examination was essentially negative, it revealed inconsistent findings and the scans showed no structural changes in the nerve roots. He also opined that if it was determined that Mr. Smith's symptoms were the result of the lumbar spondylosis, then surgical decompression was justified. RX-I, pp. 29-32.

On September 5, 1989, Mr. Smith saw Dr. Gorbitz, reporting that he experienced severe and acute back pain while cooking and had to lie down due to the severity. Dr. Gorbitz remarked that Mr. Smith appeared to be in acute distress and requested that American International approve a follow-up MRI. An MRI scan was performed on January 23, 1990. This MRI showed significant degenerative changes in the last three discs, significant collapse of the disc at L5-S1, and herniation of disc material into the spinal canal at the levels of L4-L5 and L5-S1. Dr. Gorbitz advised American International that a lumbar laminectomy was needed and would most likely require a fusion of the last three levels of the lumbar spine. He suggested that Mr. Smith be sent to Dr. King for consideration of this surgery. RX-K, pp. 47-51.

Dr. Culicchia reviewed the MRI and found no significant change. In a letter dated April 26, 1990, Dr. Culicchia reiterated that a decompressive lumbar laminectomy would not necessarily render Mr. Smith asymptomatic; however, he noted that he could not make any comment about the necessity of the lumbar spinal fusion, because it was an orthopedic surgery, which was not his expertise. RX-I, p. 34.

Dr. Gorbitz again saw Mr. Smith on March 20, 1990. Mr. Smith continued to complain of disabling lower back pain and bilateral leg pain. Dr. Gorbitz again reviewed the most recent MRI and requested that American International have Mr. Smith evaluated for a lumbar laminectomy and fusion. Dr. Gorbitz had not received any reports from Dr. Culicchia. RX-K, p. 50.

Dr. Gorbitz again saw Mr. Smith on March 20, 1990. Mr. Smith continued to complain of disabling lower back pain and bilateral leg pain. Dr. Gorbitz again reviewed the most recent MRI and requested that American International have Mr. Smith evaluated for a lumbar laminectomy and fusion. Dr. Gorbitz had not received any reports from Dr. Culicchia. RX-K, p. 50.

On April 23, 1990, Dr. Andrew King, an orthopedic surgeon, evaluated Mr. Smith. He remarked that Mr. Smith was "so anxious that an objective examination was impossible." While he found a pathology that could be addressed surgically, he did not feel that Mr. Smith was a good candidate for surgery because his psychosocial issues would likely interfere with proper postoperative recovery. Dr. King's impression was that "[m]any of his tests are non-physiological and cannot be related to the pathology shown on the MRI scan and myelogram. This indicates a degree of depression and/or psychological breakdown." He recommended a referral to a clinical psychologist and requested administration of an MMPI and pain management technique instructions. He also recommended physical therapy and facet joint injections at L4-5 and L5-S1. He noted that there was a possibility that a significant facet joint cyst was present in at least one level. He lastly recommended an evaluation by a vascular surgeon for peripheral vascular disease. RX-J, pp. 36-38.

In July of 1990, American International approved Mr. Smith's selection of Dr. Edward Connolly to conduct an independent medical examination in light of the conflicting opinions of various doctors. Dr. Connolly is a board certified neurosurgeon and first saw Mr. Smith on August 22, 1990. After reviewing the myelogram taken in 1989 and the two MRI scans taken in 1989 and 1990, Dr. Connolly determined that Mr. Smith's back condition had progressively worsened, but advised Mr. Smith that his condition did not yet warrant surgery. He instructed Mr. Smith to inform him if his discomfort became severe, but encouraged him to live with his present complaint. CX-N4, pp. 5-6, 8-10; RX-CC; CX-O.

On June 9, 1992, Mr. Smith was seen by Dr. Victoria Fernandes at Elmwood Medical Center Spine and Orthopedic Institute. He was referred there by his attorney, Mr. Mulhall. In the interview, Mr. Smith said that he had discontinued seeing Dr. Gorbitz because his insurance company did not authorize his visits. Dr. Fernandes determined that Mr. Smith had chronic low back pain syndrome, lumbar strain, and degenerative disc disease. She recommended an intensive in-patient pain control

program. Mr. Smith was admitted into the Spine and Orthopedic Institute on July 15, 1992 for inpatient physical therapy, rehabilitation nursing, occupational therapy, psychology and rehabilitation counseling. Occupational therapy reported that Mr. Smith was able to perform overhead work for fifteen minutes, static sitting for twenty-five minutes, and static standing for up to one hour. Physical and occupational therapy reported that Mr. Smith was motivated and very cooperative. Psychology diagnosed Mr. Smith with chronic pain syndrome. It reported that Mr. Smith seemed comfortable in a disabled lifestyle and might be resistant to returning to work. Rehabilitation counseling reported that Mr. Smith was interested in engaging in candy making activities if he was physically able and assisted Mr. Smith in exploring job availability. Dr. Fernandes recommended that Mr. Smith be admitted to an out-patient program that would continue to aid him in these areas. He was discharged on August 7, 1992. CX-F10.

Dr. Gorbitz saw Mr. Smith on July 6, 1992, two years after his last visit. Mr. Smith described his condition as unchanged to slightly worse. Dr. Gorbitz found mild to moderate muscle spasms in the lumbrosacral region and tenderness to light touch. He noted inconsistencies between Mr. Smith's command and spontaneous lumbrosacral movements. Mr. Smith also demonstrated a diminished right ankle reflex. Dr. Gorbitz noted that Mr. Smith was a difficult patient to examine, but he showed "significant radiological abnormalities to account for his symptoms." Dr. Gorbitz next saw Mr. Smith two years following on August 2, 1994 when he recommended that Dr. King of LSU Medical Center evaluate Mr. Smith again to consider a lumbar fusion. On November 11, 1994, Mr. Smith was seen by Dr. Mitchell Harris, an orthopedist at LSU Medical Center, who found degenerative disc disease, but did not recommend Mr. Smith for surgery. He noted that before surgery could be considered, it would be necessary to determine which discs were causing the pain. RX-K, p. 52-54; RX-J, pp. 39-40.

On April 20, 1995, Dr. Connolly saw Mr. Smith for a second time. Mr. Smith continued to complain of lower back pain with radiation down both legs, with more pain on the left leg. He reported pain even at bed rest and requested surgery. The physical exam revealed no objective changes in Mr. Smith, except that he was limping on the left. Dr. Connolly's diagnosis remained the same, and he did not recommend surgery. CX-N4, pp. 10-12.

On May 23, 1995, Dr. Connolly reviewed Mr. Smith's most recent MRI scan, which showed a disc herniation on the right. Dr. Connolly opined that the disc herniation was not consistent with Mr. Smith's pain in his left leg. He advised Mr. Smith that if his discomfort continued, a myelogram could be done. A myelogram and CT scan were performed one month later and revealed "marked spinal stenosis at L4-L5 caused by disc herniation and facet joint and ligamentous hypertrophy." Dr. Connolly determined that surgical decompression was needed at that level. CX-N4, pp. 11-13.

On July 25, 1995, Dr. Connolly performed a total L4 laminectomy with facetectomy and an L5 discectomy; no lumbar fusion was performed. Pre- and post-operative diagnoses were lumbar stenosis at L4-L5 with an L4 disc herniation. Throughout Mr. Smith's follow-up visits, he continued to complain of lower back and neck pain. However, he was able to stand erect and walked at a normal gait. CX-N4, pp. 13-14; RX-L, p. 107.

Lumbar spine x-rays reviewed on January 18, 1996 showed a degenerated disc at L5. Dr. Connolly prescribed an anti-inflammatory, Clinoril. Dr. Connolly determined that Mr. Smith had probably reached objective medical improvement from the surgery, even though he continued to complain of constant pain. He noted that Mr. Smith would be unable to return to his former work, but could do light sedentary work. On March 18, 1996, Dr. Connolly prescribed more Clinoril, because Mr. Smith said he needed it to ease his discomfort in order to sleep. CX-N4, pp. 15-22.

On October 30, 1996, Dr. John Schuhmacher, a board certified neurosurgeon, saw Mr. Smith at the request of the vocational rehabilitation specialists of Crawford and Company. Dr. Schuhmacher examined Mr. Smith on only this occasion. Mr. Smith's subjective complaints were that he had back pain, leg pain, and swelling at the base of his neck, that surgery had given him only fifty percent pain relief, and that any sort of bending, lifting or walking increased his symptoms. Dr. Schuhmacher's objective physical findings were that Mr. Smith was normal, except for diminished right ankle reflex and absent left ankle reflex. His diagnosis was post-operative decompressive lumbar laminectomy for ruptured disc and spinal stenosis at the L-4 level with residual post-operative pain syndrome. CX-N5, pp. 6-10.

Dr. Schuhmacher opined that Mr. Smith was unable to return to work "except for the most sedentary activities." He recommended that Mr. Smith avoid repetitive lifting, bending, pulling or pushing weights in excess of thirty to fifty pounds. He gave Mr. Smith a twenty-five percent permanent full man physical impairment rating. He opined that trying to get Mr. Smith back to work would likely fail. He suggested that in order to be complete in Mr. Smith's evaluation, an adlinium enhanced MRI should be done. CX-N5, pp. 10-11.

Dr. Connolly saw Mr. Smith on February 9, 1998. His physical examination was normal except his deep tendon reflexes at the knees and ankles were trace to none. At that time, Dr. Connolly felt that Mr. Smith could return to light duty work and had approved of dispatcher and cashier positions presented by Crawford and Company as acceptable employment. He disapproved of any jobs that required repetitive bending, stooping, or twisting. CX-N4, p. 25.

Mr. Smith has not since returned to Dr. Connolly for an examination. American International documents that it set up appointments for Mr. Smith to see Dr. Connolly on August 29, 2001, October 29, 2001 and July 1, 2002 and that it sent notices to Mr. Mulhall regarding these appointments. However, Mr. Smith testified that he had never seen these notices and was not aware of the appointments. TR 125, 131-132; RX-HH; RX-II; RX-JJ.

Most recently, Mr. Smith has been seen by Dr. David Rosenfeld, a physician specializing in anesthesiology and pain management. Mr. Smith was referred to Dr. David Rosenfeld by his attorney Mr. Mulhall. Dr. Rosenfeld is board eligible, but not yet board certified. At the time of his deposition, Dr. Rosenfeld had seen Mr. Smith a total of five times. He first saw Mr. Smith on May 15, 2003. He reviewed the medical records of Drs. Cashio, Gorgas, Culicchia, and Connelly prior to treating Mr. Smith. During the physical exam, Mr. Smith complained of a knife-like pain in his lower back and numbness down his legs to his feet. Dr. Rosenfeld noted muscle spasms in the lower and upper back. He diagnosed Mr. Smith with Post Laminectomy Syndrome and Lumbar Spondylosis. Dr. Rosenfeld prescribed Percoset for pain, Skelaxin for a muscle relaxer, and over-the-counter anti-inflammatories. He also diagnosed Mr. Smith with severe hypertension, but opined that the hypertension was not related to the 1988 accident. CX-N2, pp. 6-13, 28.

Mr. Smith underwent an MRI scan on June 2, 2003. The MRI scan showed some lumbar spondylosis changes at L2-3 and L3-4 with diminished disc signal, which was indicative of degenerative disc. Facet inflammation was present at L3-L4. At L4-5, there was degenerative loss of signal height and intensity. An annular bulge, facet inflammation and severe foraminal stenosis were present at L-4. L-5 had degenerative disc and foraminal stenosis. The MRI did not alter Dr. Rosenfeld's original diagnosis. That same visit, Dr. Rosenfeld administered lumbar facet median nerve branch block injections bilaterally from L-2 through S-1. The injections served to block the nerves that innervate the facet joints in an attempt to relieve pain. CX-N-2, pp. 14-18.

Because the injections were successful in providing Mr. Smith with a degree of relief, Dr. Rosenfeld scheduled Mr. Smith to receive long-term blocks of the same nerves through pulse mode radio frequency. Dr. Rosenfeld performed radio frequency on the left side on August 11, 2003. The right side was scheduled to be performed on August 18; however, when Mr. Smith arrived that day his blood pressure was too high to undergo the procedure. Dr. Rosenfeld notified Mr. Mulhall that Mr. Smith needed to see a cardiologist to get his blood pressure under control before the procedure could be completed. Dr. Rosenfeld testified that once the procedure was completed, the nerve blocks should last approximately one year. In that year the patient would have increased mobility that would possibly reeducate some of the affected back muscles to obtain long-term relief. CX-N2, pp. 18-21, 35.

Dr. Rosenfeld testified that Mr. Smith appeared to evidence signs of depression, and on August 14, 2003, he made a referral for a chronic pain management psychologist. He explained that psychiatry is not his expertise, but that due to his frequent contact with chronic pain patients who suffer from depression, he has the ability to recognize the obvious signs that warrant a referral. CX-N2, pp. 25-27.

Dr. Rosenfeld opined that Mr. Smith is currently totally disabled from employment that would involve any more than very minimal physical exertion. His disability from gainful employment may not be permanent if his pain is properly treated and he obtains job-related training. Dr. Rosenfeld testified that Mr. Smith will be in some degree of pain management for the duration of his life, given that his pain has been constant and untreated for fifteen years. CX-N2, pp. 31, 36-37.

Subsequent to giving his deposition, Dr. Rosenfeld saw Mr. Smith on January 15, 2004. He noted the Mr. Smith was in the same condition as during his previous visit in August of 2003. He stated that Mr. Smith remained totally disabled from any work that requires physical exertion. In regards to further treatment, Dr. Rosenfeld noted that he would like to complete the facet radio frequency when possible. If the facet radio frequency were to fail, he would anticipate treating the annular displacement at L4-L5 and the disk bulge at L5-S1. CX-F18, pp. 6-7.

On January 26, 2004, Mr. Smith was seen by Dr. John Steck, a neurosurgeon affiliated with Dr. Culicchia, at the request of American International. Dr. Steck did a physical exam, reviewed the most recent MRI, and reviewed Mr. Smith's medical records. He opined that from the time of his injury, Mr. Smith had primarily degenerative and arthritic changes, but has never had an objective neurological deficit. He did not believe that the surgery in 1995 was necessary or that Mr. Smith was a good candidate for that surgery. He believed Mr. Smith to be at MMI and opined that Mr. Smith could work in a sedentary capacity. RX-P.

III. PSYCHOLOGICAL EVIDENCE: Depositions

Rennie W. Culver, M.D.

In 1992, American International referred Mr. Smith to Dr. Rennie Culver, a board certified psychiatrist, for psychiatric evaluation. Dr. Culver examined Mr. Smith on June 16, 1992 for a one hour period. He took his history and performed a mental status examination. He subsequently reviewed medical records, including the records of Drs. Gorbitz, Connolly, King, Culicchia, Truax, Krainin, and Cashio. RX-AA, pp. 6-8; CX-F22, p. 1.

Dr. Culver testified that he had no independent recollection of the examination and that all of his testimony was based on his report. The mental status exam was normal, except Dr. Culver noted that Mr. Smith was hostile and had a below average intelligence. Dr. Culver opined that Mr. Smith did not show evidence of depression, anxiety or any other mental illness. Dr. Culver found Mr. Smith "somewhat antagonistic and oppositional and basically uncooperative" based on the frequency with which he answered "I don't know" or "I can't remember" to questions. Dr. Culver opined that Mr. Smith had passive aggressive personality disorder. He also found nothing from a psychiatric standpoint that would have prevented Mr. Smith from returning to work. He agreed with Drs. Culicchia and King that examinations revealed inconsistent physical findings to Mr. Smith's subjective complaints and that Mr. Smith was objectively difficult to evaluate. RX-AA, pp. 12-30; CX-F22, pp. 5-6.

After his deposition, Dr. Culver re-evaluated Mr. Smith on January 13, 2004 at the request of Employer/Carrier's attorney. He reviewed records of Drs. Landry, Rosenfeld, Gorbitz, Bluth, Sullivan, Ginzburg, Connolly, Florek, Schuhmacher, Maresh and Fernandes. Dr. Culver's diagnosis changed to include possible pain disorder associated with psychological factors. He opined that Mr. Smith still did not have depression or anxiety. He noted again that a number of Mr. Smith's physicians have noted that his complaints were disproportionate to the objective clinical findings. He again opined that there were no psychological impediments to Mr. Smith returning to work. CX-F22, pp. 15-20.

Harold Ginzburg, M.D.

Dr. Ginzburg is a board certified psychiatrist and a clinical professor in the Department of Psychiatry and Neurology at Tulane University Medical Center. In 2000, Mr. Mulhall requested the evaluation and American International approved it. Dr. Ginzburg saw Mr. Smith on three occasions. He reviewed the medical records of Drs. Cashio, Gorbitz, Culicchia, Connolly, and Schuhmacher as well as the functional capacity evaluations and physical therapy records. CX-N6, pp. 8-9; CX-F13, p. 1.

On March 21, 2000, Dr. Ginzburg conducted a clinical evaluation of Mr. Smith. He gave two "rule out" diagnoses, which are tentative diagnoses that require consideration and the collection of more information. The first "rule out" diagnosis was pain disorder with psychological features; it was based upon Mr. Smith's complaints of ongoing pain, depression and social isolation. The second "rule out" diagnosis was adjustment disorder secondary to injury; it was based upon Mr. Smith's preoccupation with his source of income and his inability to buy food and pay rent. Dr. Ginzburg diagnosed Mr. Smith as illiterate. He prescribed a low dosage of Doxepin, an antidepressant, to be taken at bed time to aid with sleep. Dr. Ginzburg opined that "independent of his orthopedic injury . . . there was no psychiatric or mental health contraindication to [Mr. Smith's] returning to the workplace." Dr. Ginzburg

recommended that Mr. Smith enroll in an adult literacy education program in order to make job placement a realistic possibility. He noted that due to his inability to read, Mr. Smith would need to have a program identified for him and would need to be shown how to get there. He referred Mr. Smith to social services on the Westbank by contacting Deborah Namias at Counseling and Consultation Center of New Orleans. CX-N6, pp. 9-13, 24.

Dr. Ginzburg saw Mr. Smith for the second time on April 4, 2000. He did not change his diagnoses and never ruled in or out any of the previously discussed conditions. Dr. Ginzburg noted that Mr. Smith's symptoms seemed to have improved. Dr. Ginzburg next saw Mr. Smith on May 9, 2000. He prescribed a pain medication, Darvon-N-50, and renewed the prescription for Doxepin. Mr. Smith reported that his social services case manager never called him. CX-N6, pp. 14, 26; CX-F13, p. 10.

Dr. Ginzburg asserted that he did not diagnose Mr. Smith with depression, but admitted that a loss of work could lead to depression. Dr. Ginzburg did not consider Mr. Smith a pain patient; he found that Mr. Smith had features of a pain patient, but that pain was only one element of his problem. He testified that Mr. Smith's pain is a result of his injury and that he cannot work as a result of the pain. His inability to work has led to other problems, such as loss of self-esteem and frustration. CX-N6, pp. 18-20, 30.

Robert David Maresh, M.D.

In 2003, Mr. Mulhall referred Mr. Smith to Dr. Maresh, a board-certified psychiatrist. Dr. Maresh saw Mr. Smith a total of four times and had three additional phone conversations with Mr. Smith. During Mr. Smith's first visit on August 22, 2003, Dr. Maresh conducted a clinical interview and a mental status exam. Mr. Smith reported that his mood was depressed and anxious. Dr. Maresh found that he had limited cognition, a fair general fund of knowledge, the ability to interpret abstractly, and a normal memory. On this date, Dr. Maresh diagnosed Mr. Smith with Axis I Adjustment Disorder with associated depressive and anxious features. CX-N3, pp. 6-10.

During the next visit on October 27, 2003, Mr. Smith did not mention anxiety. Dr. Maresh then diagnosed him with Adjustment Disorder with depressive features only. On November 11, 2003, Mr. Smith's condition remained the same. Dr. Maresh prescribed 20mg of Prozac per day. On January 15, 2004, Mr. Smith reported that he felt better, but was unable to communicate why or how. CX-N3, pp. 12-15.

Dr. Maresh explained that a diagnosis of depressed mood is different than a diagnosis of depression. Depressed mood occurs when an event happens to an individual that causes depression, decreasing the individual's ability to adapt to the new situation. A major depression includes other additional symptoms, such as sleeping and eating problems and feelings of hopelessness and suicide. Mr. Smith's sleeping problems

seemed to be due to his chronic pain, rather than a result of depression. Therefore, Dr. Maresh gave a diagnosis of depressed mood secondary to injury. CX-N3, p. 25.

Dr. Maresh testified that Mr. Smith is permanently totally disabled from employment. He opined that Mr. Smith is prevented from working by his low level of education, his chronic back pain, and his depressed mood. He explained that Mr. Smith viewed himself as a laborer and took great pride in his ability to work hard. The loss of this ability took away his self-esteem and emotionally immobilized him to the point that he could not imagine doing anything else. Dr. Maresh testified that Mr. Smith's psychiatric condition is permanent. He recommended continuation of antidepressants, physical rehabilitation, and pain management treatment. Due to Mr. Smith's positive response to Prozac, Dr. Maresh recommended that Mr. Smith see a psychiatrist regularly, who could adjust his medications as necessary. CX-N3, pp. 15-22, 27-28.

Edward Shwery, Ph.D.

In 2003, Dr. Rosenfeld referred Mr. Smith to Dr. Shwery. Dr. Shwery has a Ph.D. in clinical psychology and is board certified in pain management. Dr. Shwery saw Mr. Smith over a span of four visits in 2003 for a total of eighteen hours. Dr. Shwery reviewed the medical records of Drs. Schuhmacher, Ginzburg, Rosenfeld, Culver, Fernandez and Carthane; he also reviewed vocational evaluations and physical therapy records. He administered a clinical interview, a mental status examination and psychological tests. CX-N1, p. 6; CX-F16, pp. 1-2.

During the clinical interview, Dr. Shwery walked Mr. Smith through his typical day, showing him a visual analog scale to rank his pain from zero to one hundred during various points of the day. Mr. Smith reported that he typically awakened with pain in three primary areas of his body: a steady aching pain at a level of 20 at the back of his neck; a sharp stabbing pain at a level of 90 in his lower back; and a shooting pain at a level of 90 at the back of both legs. Exiting the bed required him to roll onto his right side, place his knees on the floor, then push himself up with a cane. During the course of the day, the pain in Mr. Smith's neck decreased if he used over-the-counter pain medications, while the pain in his lower back and legs slightly increased. At the end of the day, Mr. Smith's neck pain returned to a 20 and his lower back and leg pain were at 95. Mr. Smith said that he achieved sleep with difficulty and suffered from disturbed sleep due to his pain. CX-N1, pp. 9-19; CX-F16, pp. 2-3.

The mental status examination revealed that Mr. Smith had no indication of cognitive slippage, but evidenced cognitive confusion and illusory phenomenon. Mr. Smith saw illusory movements out of the corner of his eyes, but not true hallucinations. His fund of information and abstract reasoning were minimally adequate. His mood was deeply depressed; signs of depression included erratic weight gain and loss, loss of appetite, and sleep disorders. CX-N1, pp. 19-24; CX-F16, pp. 3-4.

Dr. Shwery gave Mr. Smith several psychological tests. The MMPI-II test, a personality and psychopathology test, indicated that Mr. Smith had very high levels of anxiety and depression. On the Beck Anxiety Inventory, Mr. Smith scored twenty-seven, which equated to a finding of severe anxiety. On the Beck Depression Inventory II, Mr. Smith scored a thirty-seven, which was in the severe range of depression. Dr. Shwery explained that the Pain Patient Profile, or P-3, is a test that is normed on chronic pain patients and rates a patient's somatization, anxiety, and depression. Somatization measures the intensity of a patient's concern about physical integrity. Mr. Smith's somatization level was in the 93rd percentile of high scores for pain patients. His anxiety level was in the 82nd percentile, and his depression level was in the 54th percentile. CX-N1, pp. 28-36; CX-F16, pp. 4-5.

In deposition, Dr. Shwery opined that Mr. Smith suffers from chronic pain as a result of his work-related accident in 1988. He explained that chronic pain is triggered by injury, disability and ongoing pain. Mr. Smith has experienced these factors for several years, and they have led to other results. Mr. Smith has suffered from fatigue, clinical anxiety, frustration, and emotional reactivity problems. These crystallized into depression and feelings of helplessness and worthlessness. As a result, Mr. Smith has developed sleep difficulties, sexual difficulties, and relationship problems. CX-N1, pp. 43-45.

Dr. Shwery testified that he did not think Mr. Smith could perform any type of work, even home-based employment. He testified that Mr. Smith's ongoing pain causes interference with his concentration and feeds his depression and anxiety. His pain requires him to change positions frequently. Dr. Shwery believed Mr. Smith's psychological condition to be so poor that if Mr. Smith were to attempt to work and subsequently fail, his recovery from his anxiety, depression, and chronic pain disorders would become even more difficult. CX-N1, pp. 46-50.

Dr. Shwery diagnosed Mr. Smith with anxiety disorder, depressive disorder, and chronic pain. He recommended supportive out-patient psychotherapy, out-patient and in-patient formal chronic pain treatment, and consultation between all care givers. He estimated the likely costs for this care to be $78,000.00. Dr. Shwery also stated that even after treatment, Mr. Smith's chronic pain may remain permanent in nature. The absence of psychological or pain management treatment over a period of fifteen years has rigidified Mr. Smith's clinical condition such that treatment is likely to be of limited benefit. Dr. Shwery stated that Mr. Smith is totally disabled and related the disability to his work-related accident of 1988. CX-N1, p. 54; CX-F16, pp. 3, 5-6.

IV. VOCATIONAL EVIDENCE: Depositions and Records

Mr. Smith's first Functional Capacity Evaluation ("FCE") was conducted on May 8, 1991 by CeCe Roman, an occupational therapist. The FCE determined that Mr. Smith was capable of performing light work. Light work includes the lifting of a maximum of twenty pounds and frequent lifting of a maximum of ten pounds. Sedentary jobs with a degree of pushing and pulling or jobs that involve a significant amount of walking or standing qualify as light work. The evaluation noted that Mr. Smith stated he would like to return to work if he is capable, that he was cooperative, that he responded favorably to feedback on proper body mechanics, and that he had no source for ideas concerning alternative employment options. Mr. Smith was found to be capable of performing work sitting at twenty-five minute intervals. He could stand while performing a manipulation task for fifteen minute intervals. RX-S.

A second Functional Capacity Evaluation was conducted on May 18, 1994 by Karen Alphonse. The FCE determined that Mr. Smith was capable of performing light medium work. Light medium work includes lifting thirty-five pounds on an occasional basis, lifting fifteen pounds on a frequent basis and lifting seven pounds on a constant basis. The evaluation noted that Mr. Smith did not give maximum effort and exhibited self-limiting behavior and symptom magnification. Mr. Smith could sit for over an hour; length of standing capability was not noted. RX-T.

A third Functional Capacity Evaluation was conducted on April 15, 1996 by Susan Weidner, a physical therapist, at Ochsner Outpatient Therapy Center. The FCE determined that Mr. Smith was capable of performing work at the light physical demand level for an eight hour day. His specific acceptable leg lift capability was zero pounds, and his torso lift capability was twenty-two pounds. He exhibited symptom exaggeration and inappropriate illness behavior; therefore, the results were considered equivocal and required that other data be considered when making vocational planning decisions. The evaluation noted that Mr. Smith was capable of constant sitting and occasional standing. The report recommended that the test be repeated after Mr. Smith was informed of his submaximal effort and counseled on the importance of giving good effort. RX-U.

On May 5, 1997, Dr. Gorbitz sent a letter to American International communicating that he had reviewed the Functional Capacity Evaluations of May 1994 and June 1996 and that Mr. Smith was able to return to work on a light duty basis. RX-K.

Angela Harold, a state-licensed Vocational Rehabilitation Case Manager and Counselor who is employed at Crawford and Company Healthcare Management, first evaluated Mr. Smith on January 8, 1996. Mr. Smith communicated his educational background, work history and medical condition. Ms. Harold administered the

Woodcock-Johnson Revised Test of Achievement to Mr. Smith. He scored at the kindergarten level on the Letter-Word Identification test, the first-grade level on the Passage Comprehension test, the second grade level on the Calculation test, and the sixth-grade level on the Applied Problems test. Ms. Harold testified that the Applied Problems test assesses the basic skills a person needs to function on a day-to-day basis; a sixth-grade score on the Applied Problems test is average for her clients. TR 60-65.

Ms. Harold found that Mr. Smith had transferable skills from his employment as a sandblaster/painter, including knowledge of tools, ability to use an assortment of tools, and understanding sketches, drawings, and specifications. She found that Mr. Smith could return to the workforce in a low-skilled job, such as a candy-maker, silver polisher, or small parts assembler in a kitchen. Ms. Harold noted that Mr. Smith was cooperative during the meeting. TR 65-66; RX-W, p. 434.

Ms. Harold conducted a labor market survey that revealed the following jobs Mr. Smith could perform. A candy maker position was available at Aunt Sally's Praline Shop in New Orleans. The employee would cook and stir the candy, pour the liquid pralines onto a table, and wrap and box the candy. Physical requirements included lifting and carrying ten to thirty pounds occasionally. The employee would mostly stand, but could sit while wrapping and boxing candy. It was a part-time job of twenty hours per week and paid five dollars an hour. TR 67, 72.

Ms. Harold indicated another position as a pot washer at Hilton Riverside Hotel. The physical requirements included lifting a maximum of fifteen pounds frequently and standing most of the time, with breaks provided. It was a full-time position and paid five dollars an hour.

Ms. Harold indicated a third job in a service person position at Hilton Riverside Hotel. The job duties included transporting service ware, polishing kitchen supplies, and loading a machine for cleaning. Physical requirements included lifting and carrying a maximum of ten to twenty pounds, alternating sitting and standing and some walking. The job was a full-time position and paid $5.18 an hour.

Ms. Harold indicated a fourth job as a public space cleaner at Hilton Riverside Hotel. Job duties were cleaning and maintaining the public restrooms, emptying trash cans, lifting and carrying a maximum of ten pounds occasionally, and pushing a cart of supplies that required a force of approximately ten pounds. There would be a combination of standing and walking. It was a full-time position that paid $5.10 an hour.

The fifth job found was as a greeter at Wal-Mart in Gretna. Job duties included greeting customers, pushing baskets out to customers, and tagging return items. The physical requirements were lifting up to five pounds occasionally and alternating between standing and walking. It paid five dollars an hour and was full-time. TR 67-70.

Lastly, Ms. Harold indicated a lobby person position at McDonald's in Harvey, Louisiana. Job duties included wiping down tables, sweeping and mopping. Physical requirements included lifting and carrying a maximum of five to ten pounds occasionally and alternating sitting, standing and walking. The employer accommodated disabilities and provides on-the-job training. TR 70-71.

Dr. Schuhmacher approved all six of the jobs. Dr. Schuhmacher testified that he only considered that Mr. Smith was capable of doing these jobs from a physical standpoint; he did not consider any mental restrictions Mr. Smith might have. Dr. Gorbitz approved four out of six of the jobs: public space cleaner at the Hilton, service person position at the Hilton, greeter position at Wal-Mart, and lobby person at McDonald's. Dr. Connolly approved only the greeter position at Wal-Mart. TR 73-74. CX-N5, pp. 12-16.

Ms. Kathleen Falgoust, a state-licensed Vocational Rehabilitation Counselor, reevaluated Mr. Smith on October 27, 1997. Ms. Falgoust testified that she was employed at Crawford and Company Healthcare Management until 2000. TR 87, 89.

Ms. Falgoust conducted a labor market survey and found several jobs suitable for Mr. Smith. A lobby person position was available at a McDonald's in Harvey, Louisiana that was located near a bus line. Job duties included cleaning tables and using a light mop and bucket. The position was full-time and paid $5.15 per hour. TR 87-90.

Ms. Falgoust indicated another position that was accepting applications as a dispatcher at a swamp tour on the Westbank. Job duties included answering the phones, dispatching the drivers, and booking reservations. Ms. Falgoust was unsure of the pay rate, but testified that it probably paid six dollars an hour. TR 91, 94.

A third position was a cashier position at Park One parking garage in New Orleans. Job duties were to accept payments from customers and provide directions to customers. A stool would be provided in the parking lot booth. Both full-time and part-time positions were available and paid $5.15 per hour. Ms. Falgoust indicated a fourth position as a dispatcher at a cab company. Job duties included answering phones, dispatching drivers and operating a two-way radio. It was a part-time position and paid $5.15 per hour. TR 92.

Ms. Falgoust indicated a fifth position as a dispatcher at a wrecker service that was accepting applications. Job duties were dispatching calls to tow trucks. It paid $5.15 per hour. A sixth position was a dispatcher position at Classic Cab in Gretna, which was accepting applications. It also paid $5.15 per hour. Lastly, Ms. Falgoust found a position

as a cashier at a self-service convenience store on the Westbank. Job duties included accepting payment from customers and providing change. This was a part-time position of twenty-four hours per week and paid $5.15 per hour. TR 92.

Ms. Falgoust submitted these job descriptions to Dr. Connolly, who approved all of the jobs except for the lobby person position at McDonald's. Dr. Connolly testified that his conclusions regarding Mr. Smith's employment did not include consideration of anxiety or depression. TR 94; CX-N4, p. 31.

On June 5, 2000, American International approved three visits to a social worker pursuant to the recommendation of Dr. Ginzburg and a request by Mr. Mulhall. Mr. Smith was seen by Randy L. Hess, MSW, who recommended that Mr. Smith enroll in an individualized literacy program. RX-GG; CX-F14.

On April 30, 2001 a vocational evaluation was conducted by Sherry J. Carthane, Ph.D., a rehabilitation counselor. Dr. Carthane reviewed the medical records of Drs. On April 30, 2001 a vocational evaluation was conducted by Sherry J. Carthane, Ph.D., a rehabilitation counselor. Dr. Carthane reviewed the medical records of Drs. Gorbitz, Cashio, Culicchia, Fernandes, Connolly and Schuhmacher as well as physical therapy records and the FCEs. She also reviewed the labor market survey done by Ms. Kathleen Falgoust of Crawford and Company and Dr. Ginzburg's psychological evaluation of Mr. Smith. She noted that Mr. Smith was very responsive during the evaluation. Mr. Smith complained of a continuous stinging pain from his lumbar area through both legs. Mr. Smith remarked that he did not feel the surgery was beneficial to him at all. On a scale of one to ten, Mr. Smith rated his pain on a good day as five and on a bad day as ten. Mr. Smith indicated that he could sit or stand in thirty minute increments. Mr. Smith described his sleeping difficulties due to pain. Mr. Smith indicated he could take care of his own personal needs without any assistance. Dr. Carthane's impression was that Mr. Smith had significant physical and mental deficits that would preclude any full time substantial gainful employment. Dr. Carthane opined that Mr. Smith would not be able to perform any of the jobs selected for him by Crawford and Company due to his lack of education and his speech impairment. He found that Mr. Smith had a loss of ability to meet the following basic work related activities: understanding, remembering and carrying out simple instructions, making simple judgments, responding appropriately to supervisors and co-workers, and dealing with changes in a routine work setting. CX-F20.

In May of 2003, Ms. Harold reopened Mr. Smith's file and completed a subsequent labor market survey with the help of Ms. Falgoust. Ms. Falgoust attempted to meet with Mr. Smith to conduct an updated vocational evaluation, but received only voice messages from Mr. Smith's attorney and was never given permission to meet with Mr. Smith. She called more than twice and wrote a letter to Mr. Mulhall. Therefore, the labor market survey of 2003 was conducted on the basis of the information she had obtained in 1997. TR 74, 95-96, 113.

A report issued October 27, 2003 indicated the following jobs suitable for Mr. Smith. Ms. Falgoust found a parking lot attendant position at Central Parking System. Physical requirements included lifting under five pounds on an occasional basis and the physical tolerance to alternate sitting and standing. It was full-time and paid $5.15 an hour. The primary job duty was to accept payments from customers. Ms. Falgoust indicated a job at a convenience store where job duties were handling cash transactions, occasional mopping and sweeping of floors and stocking shelves at the worker's own pace. It was a full-time job and paid $5.75 per hour. Ms. Harold found a position as an unarmed security guard at Vinson Guard. Job duties included standing, sitting and walking to monitor commercial sites and contacting appropriate personnel via a hand held radio or telephone. Physical requirements included frequent alternate sitting, standing and walking, occasional bending or climbing stairs and lifting up to five pounds. There was an opening for a full-time position at $5.15 per hour. TR 97-99; RX-X.

Ms. Falgoust additionally found four home-bound jobs for Mr. Smith, offered by the following companies: Angel Pin Creations Company, Home Spun Productions (two jobs available) and Artisan Home Production. Angel Pin Creations requires that the individual pay a starter kit fee, registration fee, and a security deposit, totaling less than one hundred dollars. The individual would work at his own pace and would be paid according to how many pins he made. The average person earns $250.00 per week. Ms. Falgoust admitted that in order to do a home-bound job, an individual would have to be capable of doing his own accounting. Ms. Falgoust testified that Mr. Smith's ability to keep track of his compensation check stubs since 1988 indicates that he would have the ability to keep the necessary records for the home-bound jobs. However, on cross-examination, she admitted that the necessary forms would require the ability to read. The other home-based jobs had similar arrangements. TR 100-103, 105, 117.

Ms. Falgoust never requested that the employer or insurance company provide the necessary start-up fees for the home-bound jobs, but she opined that if Mr. Smith had expressed interest in the jobs and she had requested the fees, the adjustor likely would have given the start-up fees. However, she was not allowed to meet with Mr. Smith and had no opportunity to discuss the home-bound jobs with him. TR 111-112, 116.

In preparing the 2003 labor market survey, Ms. Falgoust and Ms. Harold had reviewed Mr. Smith's medical records but did not receive the reports of Dr. Maresh or Dr. Shwery. They also did not review the deposition of Drs. Rosenfeld, Shwery, or Maresh. Ms. Falgoust and Ms. Harold admitted that the opinions of these doctors would be relevant to their recommendations. Ms. Harold testified that she did not notify the potential employers of the fact that the potential employee might be suffering from depression, anxiety, or chronic pain. She stated that whether she would recommend someone suffering from depression for employment would depend upon the severity of the condition and the prescribed medications. Ms. Harold testified that individuals on

pain medication do frequently return to the workforce. She has also returned clients with anxiety problems to the workforce. The record is silent as to whether this labor market survey was sent to any of Mr. Smith's treating physicians for approval. TR 81-86; 107-108.

Mr. Smith testified that he had not attempted to find any job since 1988 nor enrolled in any literacy program. He also testified that he has never been provided with a list of the jobs the vocational rehabilitation counselors found for him. TR 124-127.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shippbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do no contest jurisdiction under the Act. At the time of his original injury, Mr. Smith worked for Nicor National, Inc. as a sandblaster/painter. Mr. Smith's injury occurred when he was turning the crank on the wing wall of a dry dock at Nicor's yard. See JX-1. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63,65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986).

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

In this case, the parties have stipulated that Mr. Smith suffered an injury on November 4, 1988 within the course and scope of his employment with Nicor National. See JX-1. This stipulation is supported by the record and is accepted by the Court. Mr. Smith testified that on November 4, 1988 he suffered injury to his back while turning a crank on a dry dock to lift a tug boat onto blocks for sandblasting. See TR 29-30. That same day Dr. Alberto Arrillaga, a company doctor diagnosed Mr. Smith with a lumbar sacral strain. He was subsequently followed by company doctors Logan and Nelson who did not allow him to return to work due to his back injury. See RX-G; RX-H.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties have stipulated that Mr. Smith reached maximum medical improvement on June 28, 1996. See JX-1. The Court accepts this date. Mr. Smith's condition includes not only his physical back injury, but also chronic pain and its emanating psychological problems. June 28, 1996 is the date on which Dr. Connolly informed American International that Mr. Smith had reached objective medical improvement from his back surgery. See CX-F11. This date is also consistent with the maximum medical improvement of Mr. Smith's chronic pain. The medical records document that Mr. Smith's pain has persisted without change both before and after his back surgery. Dr. Connolly testified that throughout Mr. Smith's follow-up visits after the surgery, he continued to complain of lower back pain. See CX-N4, p. 13-14. On January 18, 1996, the same day that Dr. Connolly communicated to Mr. Smith that he had reached objective medical improvement, Mr. Smith complained of constant pain in his lower back that could not be alleviated by anti-inflammatories. See CX-N4, p. 15. Although Drs. Rosenfeld and Shwery did not see Mr. Smith until 2003, their opinions support the static nature of Mr. Smith's pain. Dr. Rosenfeld, a pain management specialist, opined that Mr. Smith's pain had not significantly improved after his surgery. See CX-N2, p. 36. He further stated that Mr. Smith would require pain management for the remainder of his life, given that his pain has been constant and untreated for fifteen years. See CX-N2, p. 36. Dr. Shwery found "extreme chronicity and rigidity of chronic pain and psychological problems" such that the likelihood of significant recovery was unfavorable. See CX-F16, p. 6. Claimant has submitted evidence showing that as of June 28, 1996, his pain had been continuing for a lengthy period and appeared to be of an indefinite duration. Therefore, the Court finds that Mr. Smith's back condition and resulting pain became permanent on June 28, 1996.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988).

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Mr. Smith is clearly unable to return to his former employment as a sandblaster/painter at Nicor National. The post-operative Functional Capacity Evaluation of 1996 found Mr. Smith physically capable of performing only light work. See RX-U. Mr. Smith's doctors approved him only for light sedentary work, and he was advised to avoid repetitive bending, stooping, or twisting. See CX-N4, p. 16, 28; CX-N5, p. 10.

Further, the Court finds that Mr. Smith's chronic back pain is debilitating and renders him incapable of maintaining any other employment. The Court found Mr. Smith's presentation and testimony at the formal hearing to be credible. At the hearing, Mr. Smith appeared to be in acute pain. Additionally, his live testimony was consistent with his medical records and his deposition.

Employer/Carrier argues that suitable alternative employment has been available to Mr. Smith since 1998. They submit two labor market surveys conducted in 1996 and 1997 that reveal light duty jobs approved by Dr. Gorbitz and Dr. Connolly.[4] However, the Court is not convinced that Mr. Smith's chronic pain was adequately considered by Dr. Gorbitz and Dr. Connolly when approving these jobs. Dr. Connolly stated in

[4] Dr. Connolly approved one job from the 1996 survey and five jobs from the 1997 survey, and Dr. Gorbitz approved four jobs from the 1996 survey. Dr. Schuhmacher, a neurosurgeon contacted by the vocational rehabilitation specialists in 1996, approved all jobs listed in the 1996 labor market survey. However, his opinion is given little weight as he was not a treating physician of Mr. Smith and examined him on only one occasion. See CX-N5, p. 6-10. Employer/Carrier also submitted a labor market survey conducted in 2003. See RX-X. However, the record contains no evidence pertaining to physician approval of any of the jobs listed in the 2003 labor market survey.

deposition that his opinion regarding suitable employment was strictly a neurological opinion, indicating that he considered only Mr. Smith's post-operative physical capabilities. See CX-N4, p. 31. Dr. Connolly's only consideration of Mr. Smith's pain was that Mr. Smith did not *appear* to be in acute debilitating pain on the date of his last exam on February 9, 1998. See CX-N4, p. 24. Dr. Gorbitz was not deposed in this case. The evidence presented regarding his approval of the four jobs from the 1996 survey consists of Ms. Harold's testimony at the formal hearing and her records containing an approval form signed by Dr. Gorbitz. See TR 73. The record also contains a letter from Dr. Gorbitz to Crawford and Company stating that he had reviewed the FCEs of 1994 and 1996, that he found mechanical dysfunction of Mr. Smith's lower back, and that he approved Mr. Smith for light duty work. See EX-K, p. 58. There is no evidence that Dr. Gorbitz considered Mr. Smith's chronic pain when approving him for light duty work.

Mr. Smith has presented evidence showing that pain has been a constant presence in his life since his accident in 1988. Several doctors have recommended that he undergo pain management treatment: Dr. King in 1990, Dr. Fernandes in 1992, and Drs. Rosenfeld and Maresh in 2003. See RX-J, p. 38; CX-F10; CX-N2, p. 36; CX-N3, p. 28. Mr. Smith has been diagnosed with chronic low back pain syndrome[5] and residual post-operative pain syndrome.[6] See CX-F10; CX-N1, p. 46-50; CX-N5, p. 6-10. Dr. Connolly testified that Mr. Smith "continued to complain constantly, forever, from pain." See CX-N4, p. 25. In 2000, Dr. Ginzburg, a psychiatrist agreed upon by Claimant and Employer/Carrier, gave a tentative diagnosis of pain disorder with psychological features, which he did not rule out in any of his subsequent evaluations. See CX-N6, p. 9-13. Lastly, Dr. Culver, a psychiatrist who was originally engaged by Employer/Carrier in 1992 and originally opined that Mr. Smith had only passive aggressive personality disorder, changed his opinion in 2004. Upon reevaluation, he altered his diagnosis to include possible pain disorder associated with psychological factors. See CX-F22, p. 15-20.

The Court gives weight to Dr. Rosenfeld's testimony because he is the only physician who specifically treated Mr. Smith for pain management. After unsuccessfully attempting to provide Mr. Smith some pain relief through a nerve block injection procedure, he opined that Mr. Smith was totally disabled from work that would require

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[5] Dr. Fernandes of Elmwood Medical Center diagnosed Mr. Smith with chronic low back pain syndrome in 1992 and enrolled him in an intensive inpatient pain control program for over two months. When he was discharged from the inpatient program, Dr. Fernandes recommended further pain management in an outpatient program. See CX-F10. In 2003, Dr. Shwery, a pain management psychologist, opined that Mr. Smith suffered from chronic pain as a result of his injury, subsequent disability, and ongoing pain. See CX-N1, p. 46-50.

[6] In 1996, Dr. Schuhmacher, a doctor employed to advise the vocational rehabilitation counselors, diagnosed Mr. Smith with residual post-operative pain syndrome. See CX-N5, p. 6-10.

any more than minimal physical exertion. See CX-N2, p. 23, 31. He also found that Mr. Smith evidenced signs of depression and referred him to a chronic pain management psychologist, Dr. Shwery. See CX-N2, p. 27. Dr. Shwery's review of Mr. Smith's medical records and his examination of Mr. Smith over a span of four visits, totaling eighteen hours, places him in a reliable position to determine the true interaction of Mr. Smith's physical and mental state. See CX-F16, p. 1. Dr. Shwery found that Mr. Smith's ongoing pain interfered with his concentration to the point that he could not engage in clear mental processing. He opined that Mr. Smith would make mistakes at even the simplest jobs and that Mr. Smith could not perform any type of work, even home-based employment. CX-N1, p. 46-47.

In light of the Claimant's credible complaints of pain over a period of fifteen years, the opinion of several physicians diagnosing some form of pain syndrome, and Dr. Shwery's opinion that Mr. Smith's chronic pain interferes with his mental processing, the Court finds that Mr. Smith's pain renders him totally disabled. Therefore, the Court finds that Mr. Smith has been permanently totally disabled since June 28, 1996.

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The §10(a) formula requires evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981). Where there is no such evidence, §10(a) cannot be utilized. Taylor, 14 BRBS at 495; Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976). In this case, there is no evidence in the record as to the number of days Mr. Smith actually worked during the measuring year. Without such information, it would be impossible to calculate an average daily wage. Therefore, the Court finds that §10(a) is inapplicable to this case.

Because Section 10(a) is not applicable, the Court will look to §10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under §10(a). See 33 U.S.C. § 910(b). Because no evidence was presented concerning the wages of a similarly situated employee, the Court finds that §10(b) is also inapplicable to this case.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to §10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c). Employer/Carrier asks the Court to calculate Claimant's average weekly wage based upon a notation by American International's claims investigator on December 14, 1988 that Mr. Smith presented a paycheck through November of 1988 showing gross annual wages of $13,581.03. See CX-C, p. 6. The record contains no other proof of Mr. Smith's wages in 1988 or any preceding year. The Court declines to calculate Claimant's average weekly wage based upon Employer/Carrier's lone piece of hearsay evidence. The Benefits Review Board has held that a claimant's credible testimony is a sufficient basis to support findings of claimant's average weekly wage. Hicks v. Pacific Marine and Supply Co., Ltd., 14 BRBS 549 (1981); Smith v. Terminal Stevedore, Inc., 11 BRBS 635, BRB No. 78-584 (1979). Mr. Smith testified at the formal hearing that at the time of his injury he earned $9.00 per hour and worked an average of forty hours per week. See TR 31. Claimant also testified that he had been gainfully employed by Nicor National for five years prior to his injury. See TR 28. Because the Court has found Mr. Smith to be a credible witness and because the Court has not been furnished any reliable evidence establishing Mr. Smith's actual earnings, the Court finds that Claimant's average weekly wage shall be based upon his credible testimony. Further, Claimant cannot be faulted for the unavailability of wage records dating back to 1988. Claimant's annual wage earning capacity shall be calculated by multiplying $9.00 per hour by 40 hours per week by 52 weeks, for an annual wage earning capacity of $18,720.00. Pursuant to §10(d), the average weekly wage is calculated by dividing $18,720.00 by 52 weeks, yielding an average weekly wage of $360.00. The Court finds that this figure fairly represents a calculation of Mr. Smith's average weekly wage at the time of his work injury and is acceptable under §10(c), a section under which the Court has wide discretion.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.

Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

Claimant has submitted various medical bills, prescription bills, and bills for travel expenses. See CX-I; CX-J; CX-K. The Court finds that none of the medical bills are reimbursable. Claimant has failed to provide evidence establishing that he requested authorization from American International to obtain treatment from Drs. Fernandes, Rosenfeld, Shwery and Maresh. Claimant was not referred to these doctors by authorized physicians, but was referred by his attorney, Mr. Mulhall. The Employer/Carrier is not responsible for the payment of medical bills when the claimant fails to obtain the required authorization. Slattery Assocs. V. Lloyd, 725 F.2d 780 (D.C. Cir. 1984). Additionally, an employer has not neglected to authorize treatment if the claimant never gave the employer the opportunity to refuse or authorize treatment. Marvin v. Marinette Marine Corp., 19 BRBS 60 (1986); Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162, 172 (1982). The medical expenses incurred under Dr. Greer, an alleged cardiologist who treated Mr. Smith's hypertension, are not compensable because there is no evidence that Mr. Smith's hypertension was related to his work injury. The record contains no medical reports or testimony from Dr. Greer. Employer/Carrier has shown evidence that it has paid the bills of Dr. Harris dated November 11, 1994 and of Greater New Orleans Anesthesia for which Claimant seeks reimbursement. See RX-OO, p. 1282, 1286. Lastly, the medical bills from Drs. Levy and Walder are unsupported by the record and, hence, clearly not compensable. The Court finds that the taxi receipts from 2003, covering travel expenses to visit Dr. Rosenfeld, are also not compensable as Dr. Rosenfeld was not an authorized treating physician. Accordingly, the medications prescribed by Dr. Rosenfeld are also not compensable. Claimant submitted prescriptions from Dr. Gorbitz dated August 29, 1989, September 18, 1989 and October 3, 1989 that total $143.12, and Employer/Carrier did not present evidence to the contrary. See CX-J2. Since Dr. Gorbitz was an authorized treating physician, the Court finds these prescriptions reimbursable.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993).

In this case, Employer/Carrier voluntarily paid Mr. Smith temporary total disability at the rate of $203.39 per week until March 23, 1998 at which time Employer/Carrier reduced the payments to $66.03 per week under the rationale that suitable alternative employment was available to Mr. Smith. See JX-1. This Court has awarded Mr. Smith permanent total disability as of June 28, 1996, which entitles Mr. Smith to additional compensation retroactively to the date on which the Employer/Carrier reduced compensation. Based on the Court's award of greater compensation, the Court finds that Mr. Smith is entitled to attorney's fees from Employer/Carrier.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from June 28, 1996 and continuing based on an average weekly wage of $360.00. Such compensation shall be adjusted annually for cost of living increases pursuant to Section 10(f) of the Act. The cost of living adjustment shall be effective retroactively to June 28, 1996.

2) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

3) Employer/Carrier shall reimburse Claimant in the amount of $143.12 to cover past unpaid prescriptions from Dr. Gorbitz.

4) Employer/Carrier shall pay Claimant for all reasonable and necessary future medical expenses that are the result of Claimant's November 4, 1988 employment-related injury, including medical expenses for future pain management related to his back.

5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have ten days from receipt of the fee petition in which to file a response.

6) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Adminsitrative Law Judge